

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:11-CR-285-H
NO. 5:12-CV-574-H

ANDREW BYNUM FINCH,)
Petitioner,)
v.)
UNITED STATES OF AMERICA)
Respondent.)

ORDER

This matter is before the court on petitioner's motion to vacate pursuant to 28 U.S.C. § 2255. The government moved to dismiss for failure to state a claim upon which relief can be granted, and petitioner responded. Magistrate Judge Kimberly A. Swank filed a Memorandum and Recommendation ("M&R") on November 26, 2013, recommending that the government's motion to dismiss be granted. Petitioner filed objections on December 18, 2013.

First, petitioner argues that he has suffered prejudice because he believes the two-level enhancement did have an impact on his sentence and because he is ineligible for the Residential

Drug Abuse Program within the Bureau of Prisons. Petitioner also argues that the presentence investigation report is disputed by the pleadings in this action and therefore should not be relied on for upholding the weapons enhancement. The court has carefully considered all petitioner's objections and finds them to be without merit. Petitioner has failed to show deficient performance by his counsel or prejudice resulting therefrom. Strickland v. Washington, 466 U.S. 668 (1994).

A full and careful review of the M&R and other documents of record convinces the court that the recommendation of the magistrate judge is, in all respects, in accordance with the law and should be approved.

Accordingly, the court adopts the recommendation of the magistrate judge as its own; and for the reasons stated therein, the government's motion to dismiss is GRANTED and petitioner's motion to vacate is DISMISSED. The clerk is directed to close the case.

A certificate of appealability shall not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that an assessment of the constitutional claims is debatable and that any dispositive procedural ruling dismissing such claims is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38

(2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). A reasonable jurist would not find this court's dismissal of petitioner's § 2255 motion debatable. Therefore, a Certificate of Appealability is DENIED.

This 1st day of April 2014.



Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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